Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

ROLAND L. GOAD,
Petitioner

V.

THE UNITED STATES
Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

ROLAND L. GOAD, Petitioner (pro se)
310 Sara Lane
Huntsville, Texas 77340-6764
(936) 291-2430
26 October 2000

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QUESTIONS PRESENTED

1

When disposing of an appeal from a lower court's dismissal of a case based on the Government's claim of sovereign immunity, does the appellate court have discretion to consider a motion to dismiss the appeal before it has first resolved the question of its own subject-matter jurisdiction and of the court of first instance?

2

Does an appeallate court have authority to dismiss an appeal solely on the basis of alleged conduct in prior litigation having nothing to do with the case brought before it for appellate review?

3

Absent a cross-appeal, does an appellate court have authority to grant relief to an appellee that was denied in the trial court?

4

Does an appellate court have authority to sanction a civil litigant by prohibiting him from filing any legal paper with the court without first obtaining leave of court, and ordering the clerk to refuse to accept such paper unless the sanctioned party has sought, and been granted, leave of court to submit the legal paper?

PARTIES

The caption contains the names of all parties.

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PETITION FOR WRIT OF CERTIORARI

Roland L. Goad, Plaintiff-appellant in the court below, petitions for a writ of certiorari to review the order entered in the United States Court of Appeals for the Federal Circuit dismissing the appeal and requiring the clerk to refuse to accept for filing any notice of appeal or petition from Petitioner unless he first seeks and is granted leave of court to file the document. [Pet. App. 1a] (refers to the appendix to this petition).

CITATION TO OPINIONS AND ORDERS BELOW

In Goad v. United States, 46 Fed. Cl. 395 (2000), per ANDEWELT, J., the United States Court of Federal Claims dismissed Petitioner's original complaint on the ground that his claim was barred by the doctrine of sovereign immunity. [Pet. App. 5a].

On appeal, a panel of the United States Court of Appeals For The Federal Circuit, per RICHARD LINN, Circuit Judge, dismissed the appeal as frivolous and ordered the clerk to refuse to accept for filing any notice of appeal or petition unless petitioner first seeks and is granted leave of court to file the document. [Pet. App. 1a].

On August 16, 2000, an order per JAN HORBALY, Clerk of the Court of Appeals, rejected Petitioner's "Motion for the court to recall the mandate" and "Petition for panel rehearing and rehearing en banc." [Pet. App. 12a].

JURISDICTION IN THIS COURT

The original complaint was dismissed in the Court of Federal Claims on March 23, 2000. [Pet. App. 5a]. Notice of Appeal was received by the Clerk of the Court of Federal Claims on April 3, 2000 and the appeal was docketed in the Federal Circuit on April 10, 2000, Case No. 00-5063.

The appeal was dismissed in the Federal Circuit on July 21, 2000 [Pet. App. 1a]. petition for rehearing was rejected by the clerk of the Federal Circuit on August 16, 2000. [Pet. App. 12a].

The Federal Circuit had jurisdiction of the appeal under 28 U.S.C. § 1295 (a) (3) "The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from a final decision of the United States Court of Federal Claims."

This Court has jurisdiction to consider this petition for writ of certiorari under 28 U.S.C. 1254 (1) : Cases in the courts of appeals may be reviewed by the Supreme Court by...writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

THE STATUTES AND RULES INVOLVED ON THIS CASE

10 U.S.C. § 1461 [page 6]

(a) There is established on the books of the Treasury a fund to be known as the Department of Defense Military Retirement Fund (hereinafter in this chapter referred to as the "Fund"), which shall be administered by the Secretary of the Treasury. The Fund shall be used for the accumulation of funds in order to finance on any actuarially sound basis liabilities of the Department of Defense under military retirement and survivor benefit programs.

10 U.S.C. § 1463 [pages 6, 7 & 9]

(a) There shall be paid from the Fund –

(1) retired pay payable to members on the retired lists of the Army, Navy, Air Force, and Marine Corps;

(2) retired pay payable under chapter 67 of this title to former members of the armed services (other than retired pay payable by the Secretary of Transportation);

(3) retainer pay payable to members of the Fleet Reserve and Fleet Marine Reserve;

(4) benefits payable under programs under the jurisdiction of the Department of Defense that provide annuities to survivors of members and former members of the armed services, including chapter 73 of this title, section 4 of Public Law 92-425; and section 5 of Public Law 96-402; and

(5) amounts payable under section 1408 (h) of this title.

(b) The assets of the Fund are hereby made available for payments under subsection (a).

28 U.S.C. § 1254 (1) [page 2]

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 1295 (a) (3) [page 2]

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction
(3) of an appeal from a final decision of the United States Court of Federal Claims.

28 U.S.C. § 1491 (a) (1) [pages 6, 7 & 9]

The United States Court of Federal Claims shall have jurisdiction to render judgement upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

Federal Rule of Appellate Procedure 25 (a) (4) [p. 10]

(4) Clerk's Refusal of Documents. The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

Supreme Court Rule 10 (a) [page 10]

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

STATEMENT OF THE CASE

A civil suit was brought in the United States Court of Federal Claims to recover the amount of money that has been deducted, and is still being deducted, from Petitioner's military retired pay. [Pet. App. 13a].

Subject-matter jurisdiction was alleged under the Tucker Act, 28 U.S.C. § 1491 (a) (1) (page 4). To satisfy the requirement of a separate money mandating statute, Petitioner alleged that Section 1461 of Title 10, U.S. Code (page 3) establishing the Department of Defense Military Retirement Fund, and Section 1463 (a) (1) of Title 10 provided the statutory basis for this claim for earned but unpaid military retired pay.

The Federal Circuit's order of dismissal [Pet. App. 1a] makes no reference to these jurisdictional statutes. Similarly, the trial court's order of dismissal managed to omit any reference to these jurisdictional statutes.

The Government's moving papers [Pet. App. 15a & 16a] filed in the courts below make no reference to the Tucker Act, 28 U.S.C. § 1491 (a) (1) or to the statutes establishing the Military Retirement Fund, 10 U.S.C. 1461. In each instance, the Government re-characterized this civil suit as a claim for refund of the public money being disbursed to Petitioner's former spouse allegedly under the Uniform Services Former Spouses' Protection Act.

The Government moved for dismissal on the basis of a claim of sovereign immunity [Pet. App. 15a]. This claim of sovereign immunity was sustained by the Court of Federal Claims and the action was dismissed. [Pet. App. 6a].

In its order of dismissal [Pet. App. 6a] the court of Federal Claims avoided making any reference to the Tucker Act or the Department of Defense Military Retirement Fund.

The Government also moved for sanctions based on allegations concerning Petitioner's conduct of prior litigation having nothing to do with this case. The sanction motion was denied. [Pet. App. 7a]. no cross appeal ws filed challenging the propriety of the court's refusal to impose sanctions.

Appeal was docketed on April 10, 2000. On April 18, 2000, the Government moved for a punitive dismissal and award of double costs based on the same allegations of past conduct which had been rejected by the trail court.

The Federal Circuit, based solely on the Government's motion and without a trial record or an appellate brief, dismissed the appeal as frivolous and directed the clerk to refuse to accept for filing legal papers from petitioner unless he first seeks and is granted leave of court to submit the document to the clerk.[Pet. App. 1a].

The clerk issued an order rejecting "Petition For Rehearing" because of Petitioner's failure to obtain leave of court before submission of the petition for rehearing. [Pet. App. 12a].

BASIS FOR FEDERAL JURISDICTION IN THE TRIAL COURT

Federal jurisdiction is based on the Tucker Act, 28 U.S.C. 1491 (a) (1). Section 1463 (a) (1) of Title 10, U.S. Code provides the money-mandating statute on which the claim for money is based.

REASONS FOR THE ALLOWANCE OF THIS WRIT

The Government's claim of immunity was sustained and the case was dismissed on the basis of sovereign immunity. [Pet. App. 5a]. The doctrine of sovereign immunity is jurisdictional in nature. See FDIC v. Meyer, 510 U.S. 471, 475 (1994). "A court lacks discretion to consider the merits of a case over which it is without jurisdiction." Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 370 (1981).

Every appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review. Steel Co. v. Citizens For Better Environment, 523 U.S. 83, 95 (1998).

The United States Court of Appeals For The Federal Circuit failed to make this threshold determination so now it is the duty of this Court to do so. The question must be resolved before the Court proceeds to any other question.

The Federal Circuit's order of dismissal is based solely on alleged conduct of prior litigation having nothing to do with this case. By its action in this case, the Court of Appeals ignored the precedent established in Ortega-Rodriguez v. United States, 507 U.S. 234, 246 (1993) where this Court held there is no authority that will allow an appellate court to sanction by dismissal an appeal based on conduct having no connection with the course of the appellate proceedings under review in the appellate court.

In the Court of Federal Claims the Government also moved for sanctions based solely on allegations of Petitioner's conduct of prior litigation. The sanction motion was denied. [Pet. App. 7a]. No cross-appeal was filed challenging the trial courts action.

In the court of Appeals the Government renewed its motion for a punitive dismissal based solely on allegations of Petitioner's conduct of prior litigation. The Government's motion was granted. In so doing, the Court of Appeals ignored a long established precedent in which this Court stated that absent a cross-appeal, an appellee may urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court, but may not attack the decree with a view either of enlarging his own rights thereunder or of lessening the rights of his adversary. El Paso Nat. Gas Co. v. Neztsosie, 526 U.S. 473, 479-480 (1999).

In his original complaint, Petitioner specifically alleged that Section 1463 (a) (1) of Title 10, U.S. Code provided the basis for this claim for his accrued but unpaid military pay as required to invoke the Tucker Act. [Pet. App. 14a].

By simply ignoring these statutes the courts below have violated the fundamental precept of federal jurisdiction that a claim arises under the particular statute which creates the cause of action. American Well Works Co. v. Layne and Bowler Co., 241 U.S. 257, 260 (1916). "Jurisdiction may not be sustained on a Theory that the plaintiff has not advanced." Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 809 (1986).

On its own initiative and without a moving party, an appellate brief, or a trial record, the Court of Appeals ordered that Petitioner was not to file any additional appeal or action without first seeking leave of court to dō so [Pet. App. 3a].

The Court's order was based solely on unsupported allegations having nothing to do with this case. In effect, the courts became the complainant, the material witness, the

prosecutor, judge and executioner all in one. No provision was made for confrontation, cross-examination, rebuttal or any similar attribute of a court of justice. The court's victim was ordered not to attempt to petition his government for redress of grievances without prior consent of a federal judge.

The court's action is such an arbitrary mandate as to not be in the domain of free government and cannot be sustained on any basis whatsoever.

The clerk was directed not to accept for filing any notice of appeal or petition unless prior leave of court had been obtained by Petitioner. [Pet. App. 4a]. petition for rehearing was rejected by the clerk on August 16, 2000 [Pet. App. 12a].

The court's action fails to accord with the basic requirements of Appellate Rule 25 (a) (4). The committee note states that refusal to accept for filing "is not a suitable role for the office of the clerk and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this rule."

The United States Court of Appeals For The Federal Circuit, in this case, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers under Rule 10 (a).

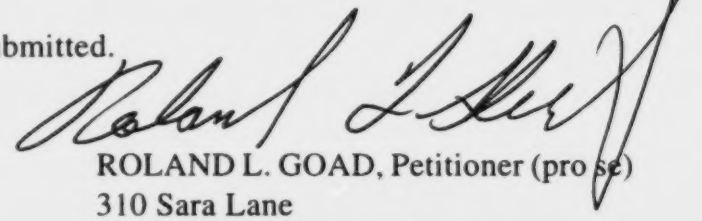
It is essential to protect the ability of those who perceive themselves to be aggrieved by the activities of governmental authorities to seek redress through all the channels of government. Hence, the act of filing suit against a governmental entity represents an exercise of that right of petition and thus invokes constitutional protection. Therefore, when a citizen is justified in concluding that he has suffered a wrong, he has a constitutional right to call to his aid the whole power of the

law in the protection of those rights, and it is in the public's interest that a sufficient remedy is provided, and a resort to the courts be encouraged, in order to diminish the ever present temptation to redress one's own wrongs.

This right to sue and defend in the courts is the alternative to force. In an organized society it is the right conservative of all others, and lies at the heart of orderly government. Chambers v. Baltimore & Ohio R.R., 207 U.S. 142, 148 (1907).

Because subject-matter delineations must be policed by the courts on their own initiative even at the highest level, Rhurgas AG v. Marathon Oil Co., 526 U.S. 574, 582 (1999), a writ of certiorari should issue in this case. Granting the writ will serve institutional objectives by permitting this Court to assure that proceedings in lower federal courts are conducted within the bounds delineated by the Constitution, federal statutes, and the rules established by this Court.

Respectfully submitted.



ROLAND L. GOAD, Petitioner (pro se)
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26 October 2000

Order of the Federal Circuit entered on July 21, 2000 dismissing the appeal and ordering clerk to refuse to accept for filing any notice of appeal or petition unless Petitioner first seeks and is granted leave of court to file the document.

UNITES STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

00-5063

ROLAND L. GOAD, Plaintiff-Appellant,

v.

UNITED STATES, Defendant-Appellee.

ON MOTION

Before RADER, GAJARSA, and LINN, Circuit Judges.

LINN, Circuit Judge.

ORDER

The United States moves to dismiss Roland L. Goad's appeal as frivolous and moves for sanctions pursuant to Fed. R. App. P. 38. Goad opposes. Goad moves to injoin the government from paying portions of his military pay to his former spouse pending disposition of this appeal. The United States opposes. Goad replies. Goad has challenged, in various state and federal fora, the payment to his former spouse of a portion of his military retired pay pursuant to the Uniformed Services Former Spouses' Protection Act. 10 U.S.C. § 1408. His former spouse has applied for and was awarded, in 1985, a portion of Goad's retirement benefits pursuant to their 1980 divorce decree. Goad was thereafter found in contempt of a state court for failure to pay. Among other lawsuits, Goad sued in a federal district court for damages

arising out of his imprisonment for contempt. The district court dismissed Goad's complaint. When the United States Court of Appeals for the Fifth Circuit ruled on Goad's appeal in 1991, it noted that it was the sixth lawsuit relating to the military benefits. Goad v. Rollins, 921 F. 2d 69, 70 (5th Cir. 1991). The Fifth Circuit dismissed Goad's appeal as "patently frivolous" and remanded to the district court for computation of damages due to the frivolous nature of the appeal. Id. at 71. The Fifth Circuit also directed all clerks of court under its jurisdiction to refuse to accept filings from Goad unless a judge first specifically authorized the filing. Id.

Other courts have also sanctioned Goad for filing frivolous actions. For example, the United States District Court for the Southern District of Texas sanctioned Goad $4.748.40 and directed that no further causes of action be filed until the sanction be paid. Goad v. United States, 661 F. Supp. 1073 (S.D. Tex 1987). On appeal, we affirmed that district court's sanction award. Goad v. United States, 1987 WL 22310 (Fed. Cir. Dec. 9, 1987).

This is Goad's third appeal in the Federal Circuit concerning the payment of a portion of his military benefits to his former spouse. In addition to the appeal from the Southern District of Texas action, Goad appealed to this court from Claims Court decision in 1991 that dismissed Goad's claim for a refund of military retirement funds paid to his former spouse. We affirmed the dismissal on the ground that Goad could not successfully sue the United States concerning the payment of military benefits to his former spouse. Goad v. United States, 1992 WL 190516 (Fed. Cir. Aug. 12, 1992).

The present appeal is an appeal of the Court of Federal Claims' March 23, 2000 dismissal of Goad's complaint on the ground of res judicata, based in turn on the 1991 Claims Court dismissal. The Court of Federal Claims declined to sanction Goad for filing the most recent action stating:

> Herein, however the application of res judicata to the instant facts is a sufficiently esoteric legal issue and the court will not say that plaintiff, who is not an attorney, acted unreasonably. But plaintiff now should understand that his claim for the funds sought is barred and should refrain from presenting the same claim again to this court.

In his opposition to the United States motion to dismiss and for sanctions, Goad argues that this court should not determine whether his appeal is frivolous without reading this brief. In his brief, Goad argues, inter alia, that he is not seeking money that was not paid to his former spouse but is seeking money that was not paid to him. Having reviewed Goad's brief, we agree with the United States that Goad's appeal is frivolous and we dismiss the appeal pursuant to Fed. R. App. P. 38.

Pursuant to Rule 38, the United States also seeks the awarding of double costs as a sanction. Despite his prose status, Goad has not shown why such an award would be improper. Additionally, we deem it proper to impose another sanction imposed by other courts, namely that Goad may not file any additional appeal or action in this court without first seeking leave of this court to do so.

Accordingly,

IT IS ORDERED THAT:

(1) The United States' motion to dismiss the appeal as frivolous is granted.

(2) The United States; motion to award the United States its double costs for this appeal is granted.

(3) The clerk is directed not to accept for filing any notice of appeal or petition submitted by Roland L. Goad unless Goad first seeks and is granted leave to file the document.

(4) Goad's motion is denied.

FOR THE COURT

Jul. 21, 2000

RICHARD LINN
Circuit Judge

ISSUED AS A MANDATE JUL 21 2000

Goad v. United States, 46 Fed. Cl. 395 (2000). Order entered on March 23, 2000 dismissing original complaint on ground of sovereign immunity.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
No. 99-311C
(Filed: March 23, 2000)

ROLAND L. GOAD, Plaintiff,
v.
THE UNITED STATES, Defendant.

Military pay; res judicata, curable defect exception; sanctions. Roland L. Goad, Huntsville, Texas, pro se.
Kyle Chadwick, with whom were David W. Ogden, Acting Asistant Attorney General, David M. Cohen, Director, and James M. Kinsella, Assistant Director, Washington, D.C. for defendant. Major Karen L. Tibbals, U.S. Air Force, of counsel.

ORDER

ANDEWELT, Judge.

I.

In this military pay action, plaintiff, Roland L. Goad, a retired member of the United States Air Force, appearing pro se, seeks to recover funds deducted from his military retired pay and paid to his former spouse, Mary Beth Goad. These deductions were made pursuant to the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408 (1994), and a divorce decree issued by a Texas State Court which provided that Mary Beth Goad shall receive a specified percentage of plaintiff's Air Force retirement benefits.

Plaintiff sought identical relief in Goad v. United States, 24 Cl. Ct. 777 (1991), aff'd, 976 747 (Fed. Cir. 1992). (Goad I), in which this court, per Judge Reginald W. Gibson dismissed the complaint for failure to state a claim upon which relief can be granted. See id. at 786. The court rested its decision on Section 1408 (f) (1) of the USFSPA, which provides in part:

> The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired or retainer pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face of such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

10 U.S.C. § 1408 (f) (1) (1994). The court reasoned that Section 1408 (f) (1) specifically rejects any waiver of sovereign immunity for suits against the United States for payments made to spouses of military personnel when the payments are made pursuant to a divorce decree found to be "regular on its face." The court listed the criteria used to determine the regularity of a divorce decree and then concluded that "[t]he divorce decree at issue in this case unequivocally meets these criteria." Id. at 785. Based on the absence of any waiver of sovereign immunity, the court dismissed plaintiff's complaint for failure to state a claim under RCFC 12 (b) (4). The Court of Appeals for the Federal Circuit affirmed in an unpublished order, as follows: "The Claims Court was correct as a matter of law. Mr. Goad cannot recover from the United States the money paid to Mr. Goad. Mr. Goad has no claim cognizable before the Claims Court. This court properly dismissed his action." Goad v. United States, No. 92-5053, slip. op. at 3 (Fed. Cir. Aug. 12, 1992).

Plaintiff's current complaint is before the court on defendant's motion to dismiss and plaintiff's motion for summary judgement. In addition, plaintiff had filed a series of RCFC 12 (f) motions to strike and each party has moved to sanction the opposing party. For the reasons set forth below, defendant's motion to dismiss is granted and all other motions are denied.

II.

In the instant action, plaintiff renews the claim presented in Goad I seeking to recover the funds deducted from his military retired pay and paid to his former spouse. In its motion to dismiss, defeendant argues that the doctrine of res judicata bars this action. Res judicata, commonly known as "Claim preclusion," "prevents a party from relitigating the same claims that were or could have been raised [in a prior action]." case. Inc. v. United States, 88 F. 3d 1004, 1011 (Fed. Cir. 1996). Res judicata serves the public interest by reducing the number of lawsuits, conserving judicial resources, and preventing inconsistent decisions. See Faust v. United States, 101 F. 3d 675, 677 (Fed. Cir. 1996). In determining whether to apply res judicata, the courts employ a three-part test: "(1) whether the parties involved are legally identical; (2) whether the transaction or events underlying the claims are substantially related, and (3) whether the non-moving party had a 'full and fair opportunity to litigate the original claim.'" Bernaugh v. United States, 38 Fed. Cl. 538, 544 (1997) (quoting Reidt v. United States, 13 Cl. Ct. 741, 744 (1987)); see also People Who Care v. Riockford Bd. of Educ., 68 F. 3d 172, 177 (7th Cir. 1995) (applying the three-part test); In re International Nutronics, 28 F. 3d 965, 969 (9th Cir. 1994) (same); United States v. Alcan Aluminum Corp., 990 F. 2d 711, 718 (2nd Cir. 1993) (same).

In the instant case, all three parts of this test are satisfied. First, the parties in this suit are the same parties who litigated Goad I. Second, the transactions or events underlying the two claims are identical - both claims contest the validity of the order pursuant to the USFSPA garnishing plaintiff's pay. Third, in Goad I, plaintiff has a full and fair opportunity to litigate his position, both in this court and in the Court of Appeals of the Federal Circuit. On this last point, in the instant complaint and the subsequent filings in the instant action, plaintiff relies upon legal arguments which appear to be variations, or subsumed within, the six legal arguments the court listed and found unconvincing in Goad I. In any event, as noted above, even if plaintiff relies upon different legal arguments herein, res judicata prevents a party from relitigating the same claims that "were or could have been raised [in the prior action]." Case 88 F. 3d at 1101 (emphasis added). Nothing barred plaintiff from presenting the legal arguments upon which he relies in this action when he attack the garnishment in Goad I.

Plaintiff argues that Goad I was dismissed for lack of jurisdiction, and because dismissals for lack of jurisdiction are without prejudice, plaintiff properly files in his second action setting forth the same claims set forth in the first. But Goad I was not dismissed for lack of jurisdiction but rather for failure to state a claim upon which relief can be granted. Dismissals for failure to state a claim upon which relief can be granted are "on the merits," Spruill v. Merit Sys. Protection Bd., 978 F. 2d 679, 686 (Fed. Cir. 1992), and are entitled to res judicata effect. See Faust, 101 F. 3d at 677.

Moreover, even if the dismissal of Goad I wee viewed as a dismissal for lack of jurisdiction and not a dismissal for failure to state a claim upon which relief can be granted, the instant claim is still barred. Dismissals for lack of jurisdiction do not reach the merits of a claim and therefore are without prejudice to a plaintiff filing a new suit in a court with proper jurisdiction to address the merits. See Richmond, Fredricksburg and Potomac R.R. v. United States, 27 Fed. Cl. 275, 286 (1992) (citing Scott Aviatin v. United States, 953 F. 2d 1377, 1378 (Fed. Cir. 1992)). But when addressing jurisdiction over the second-filed claim, the doctrine of resjudicata potentially can apply. A court always possesses jurisdiction to determine the scope of its own jurisdiction, and "[d]ismissals for lack of jurisdiction may be given res judicata effect as to the jurisdictional issue." Amgen, Inc. v. United States Int'l Trade Comm'n, 902 F. 2d 1532, 1536 n. 5 (Fed. Cir. 1990); see also Dozier V. Ford Motor Co., 702 F. 2d 1189, 1196 (D.C. Cir. 1983) (applying res judicata to a determination that 28 U.S.C. § 1332's "amount in controversy" requirement had not been met); Zoriano Sanchez v Carribean Carriers Ltd., 552 F. 2d 70, 72 (2nd Cir 1977) (applying res judicata to a determination that the Jone's Act requirement of nexus with the United States had not been met). Hence, if the second-filed claim presents the same urisdictional issue as raised in the first suit, the doctrine of res judicata bars the second claim. On the other hand, if the second-filed claim contains new information which cures the jurisdictional defect fatal to the first-filed suit, then the second-filed suit presents a different jurisdictional issue and res judicata does not apply. This "curable defect" exception to res judicata applies in the following situation:

> where a "precondition requisite" to a court's proceeding with the original suit was not alleged or proven, and is supplied in the second suit - for example, the Government's filing of a affidavit of good cause in a denationalization proceeding, proper service of process, or residency adequate to invoke diversity jurisdiction...the deficiency pertaining to a fact (filing an affidavit, service of process or present residence) separate and apart from the past and completed transaction that constituted the cause of action.

Dozier, 702 F. 2nd at 1192 (internal citations omitted). In Goad I, the court found a lack of jurisdiction on the ground that the United States did not waive its sovereign immunity to permit plaintiff to sue for the retirement payments paid to his former spouse, this defect of failure to waive sovereign immunity has not been and cannot be, cured in the instant complaint and, hence, res judicata applies.

III.

Both parties have moved for sanctions. Plaintiff's motion is based on the alleged unsoundness of defendant's motion to dismiss, which the court finds not only reasonable but also correct. Hence, plaintiffs motion is denied. Defendant contends that sanctions are appropriate against plaintiff because the instant action is frivolous in view of Goad I and was intended to harass plaintiff's former spouse. A plaintiff must reasonably consider the viability of his or her claims before filing those claims in court. See RCFC 11, and if a court concludes that a litigation is abusing the judicial process, the court may impose sanctions, including reasonable

restrictions on the litigant's access to the courts. See Perrin v. United States, No. 92-264C (ct. Fed. Cl. Apr. 10, 1992); cf Zuger V. United States, 834 F. 2d 1009, 1010 (Fed. Cir. 1987) (warning a pro se litigant that the court "shall likewise impose sanctions in any future 'tax protester' case in which the appeal is frivolous"). Mr. Goad has engaged in litigation contesting the deductions from his military retirement pay for the past fifteen years, and on occasion, courts have described his claims as "frivolous" and have imposed sanctions. See, e.g. Goad v. United States, 785 S.W. 2d 356 (Tex. App. 1989); Goad v. United States, 661 F. Supp. 1073 (S.D. Tex. 1987); Goad v. Rollins, 921 F. 2d 69 (5th Cir. 1991). Herein, however, the application of res judicata to the instant facts is a sufficiently esoteric legal issue and the court will not say that plaintiff, who is not an attorney, acted unreasonably. But plaintiff should understand that his claim for the funds sought is barred and he should refrain from presenting the same claim again to this court.

Conclusion

For the reasons set forth above, defendant's motion to dismiss is granted and all other motions are denied. The clerk of the Court shall enter judgement accordingly. No costs.

IT IS SO ORDERED.

ROGER B. ANDEWELT
Judge

Order issued by the Clerk, U.S. Court of Appeal for the Federal Circuit refusing to accept for filing legal papers submitted by Petitioner

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

00-5063

ROLAND L. GOAD, Plaintiff-Appellant,

v.

UNITED STATES, Defendant-Appellee.

ORDER

Roland L. Goad submits a "motion for the court to recall the mandate," and "petition for panel rehearing en blanc." No response has yet been received.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) Goad having failed to comply with the Court order of July 21, 2000 regarding the necessity to first seek leave of court prior to submission of any documents, the above documents are hereby rejected.

Aug. 16, 2000 FOR THE COURT

(signed)
Jan Horbaly
Clerk

Goad v. U.S., No. 99-CV-311, Ct. Fed. Cl., Doc. #1, "Original Complaint," filed 17 May 1999.

(Excerpts)

page 1

1. Plaintiff, Roland L. Goad, respectfully brings this action in the United States Court of Federal Claims for the purpose of obtaining a judgment for those amounts of his pay that have been deducted since 1 September 1985.

2. Section 1491 (a) (1) of Title 28, United States Code provides jurisdiction for this court to heart this case:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491 (a) (1) (The Tucker Act).

page 2

3. By an act of Congress a Department of Defense Military Retirement Fund has been established on the books of the United States treasury. Section 1463 of Title 10, United States Code was enacted as part of Section 925 of the Department of Defense Authorization Act, 1984, Pub. L. 98-94, 97 Stat. 614, 644-648 (September 24, 1983):

10 U.S. C. § 1461 Establishment and purpose of Fund, definitions

(a) There is established on the books of the Treasury a fund to be known as the Department of Defense Military Retirement Fund (hereinafter in this chapter referred to as the "Fund"), which shall be administered by the Secretary of the Treasury. The Fund shall be used for the accumulation of funds in order to finance on an actuarially sound basis liabilities of the Department of Defense under military retirement and survivor benefit programs.

10 U.S.C. 1463 Payment from the Fund

(a) There shall be paid from the Fund–

(1) retired pay payable to members on the retired lists of the Army, Navy, Air Force, and Marine Corps.

page 3

7. Plaintiff specifically alleges that Section 1463 (a) (1) of Title 10, United States Code, provides the statutory basis for this claim for accrued but unpaid military retirement pay as required to invoke the jurisdiction of this Court under the Tucker Act (28 U.S.C. § 1491 (a) (1)).

Goad v. U.S., No. 99-CV-311, Ct. Fed. Cl., Doc. #10, "MOTION BY USA to dismiss in lieu of answer.."

(Excerpts)

page 1

Pursuant to Rule 12 (b) (1) and (b) (6) of this Court's Rules ("RCFC"), the Government respectfully requests that the court dismiss the complaint in this action for the failure to state a claim upon which relief can be granted...

Plaintiff, Roland L. Goad sues to recover funds deducted from this military retired pay and paid to his former spouse, Mary Beth Goad, pursuant to the Uniformed Services Former Spouses' Protection Act (FSPA0, 10 U.S.C. 1408, and a divorce decree issued by a Texas state court.

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As a matter of law, the United States is immune from liability for FSPA payments made in accordance with 10 U.S.C. § 1408 when a former spouse presents a divorce decree that is "regular on its face." ...Thus, since sovereign immunity has not been waived to permit this lawsuit, and the Court cannot grant relief, the complaint must be dismissed....

The Government respectfully requests that the Court dismiss Mr. Goad's complaint on either or both of the foregoing grounds.

Case #5063, U.S. Court of Appeals for the Federal Circuit, "Appellee's Motion to Dismiss Appeal as Frivolous as Filed and Motion For Rule 38 Sanctions" submitted by the Government on 18 April 2000.

(Excerpts)

page 1

Pursuant to Rule 27 and 38 of the Federal Rules of Appellate Procedure and Federal Circuit Rule 27, the defendant-appellee, the United States respectfully requests that the Court dismiss this appeal upon the grounds that it is frivolous as filed and award us double costs.

The plaintiff-appellant, Roland L. Goad, seeks the return of that portion of his military retired pay that is paid to his former spouse pursuant to a 1980 divorce decree and the Uniformed Services Former Spouses Protection Act, 10 U.S.C. § 1408.

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WHEREFORE, for the reasons given above, we respectfully request that the Court dismiss this appeal as frivolous and award us double costs pursuant to Rule 38.